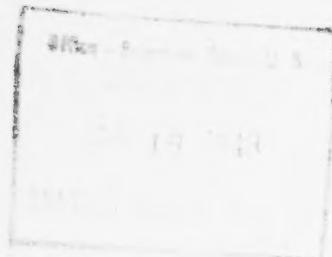


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IN THE
SUPREME COURT
OF THE UNITED STATES

—
No. 660

—
MOLINE PROPERTIES, INC.,

Petitioner,

—vs.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

—
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

—
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your petitioner, Moline Properties, Inc., respectfully
prays that a writ of certiorari issue to review the judg-
ment of the United States Circuit Court of Appeals for
the Fifth Circuit, entered on November 7, 1942, in a
cause numbered and entitled on its Docket No. 10279,
Commissioner of Internal Revenue, Petitioner, vs.
Moline Properties, Inc., Respondent, reversing the de-
cision of the United States Board of Tax Appeals.
Petition for rehearing was denied December 11, 1942.

OPINION BELOW

The opinion of the Board of Tax Appeals is reported
at 45 B.T.A. 647 (Rec. P. 19). The opinion of the Circuit
Court of Appeals is not yet reported but is available in
the Commerce Clearing House 1942 Federal Tax Service
at paragraph 9728 on page 10717. (Rec. p. 90).

STATUTES INVOLVED

The statutes involved, set out, *infra*, in the appendix, are:

Sections 13(a), 22(a), and 52 of the Revenue Act of 1934, ch. 277, 48 Stat. L. 680, and Sections 13(b), 22(a), and 52 of the Revenue Act of 1936, ch. 690, 49 Stat. L. 1648.

SUMMARY STATEMENT OF MATTER INVOLVED

This proceeding is an income tax case involving the taxable years 1935 and 1936. The Board of Tax Appeals (now the Tax Court) in a decision rendered November 7, 1941, sustained the petition of Moline Properties, Inc., for a redetermination of the petitioner's tax liability for 1935 and 1936, and held that there was no deficiency or penalty. The Commissioner had asserted deficiencies for 1935 and 1936 in the amounts of \$4,993.82 of income taxes, and \$4,344.95 of excess profits taxes, plus a delinquency penalty for 1936 or \$788.35. The board rendered a decision finding no deficiency (Rec. p. 22). On the Commissioner's appeal the Circuit Court of Appeals for the Fifth Circuit, reversed. (Rec. p. 90). This petition is to obtain a review of that decision.

All of the asserted deficiencies are predicated upon the Commissioner's insistence upon recognition of the separate entity of a "dummy" corporation. During the year 1928 one Uly O. Thompson, a resident of Florida and a Circuit Judge in that state, was the owner of a large amount of real estate. He was hard pressed financially for ready money. Among the parcels of real estate owned by him were four lots in Miami Beach, Florida, on which were two mortgages, one of \$20,000 held by one William F. Whitman, the other, a second mortgage, also for \$20,000, held by the Miami Beach Bank and Trust Company. These mortgages had been given in 1923 and 1926, respectively. The land did not prove profitable. In 1928 back taxes on it amounted to \$6,500. Pressed by the second mortgagee to pay the

taxes or lose the property (P. 36), he sought, upon demand of the Bank, and obtained from the Bank of Bay Biscayne, an affiliate of the second mortgagee, a loan of \$6.750, on the condition that he convey title to a corporation organized by the bank to hold title. Stock was to be issued to Thompson to be turned over to the bank as collateral and be voted by a bank officer under a voting trust in favor of the bank, which, however, was to cease on payment of the loan or sale of the stock pledged. The bank organized the petitioner corporation under this arrangement (Rec. p. 33 and 36). Thompson, on June 5, 1928, conveyed the four parcels to it, in return for its stock, which he conveyed to the bank's voting trustee. The corporation assumed the mortgages. Moline Properties, Inc., was "purely a receptacle to hold the title to this property in order to get the bank to loan that money, take care of the taxes" (Rec. p. 36). The incorporators, dummies of course, were employes of the bank (Rec. p. 38), and the bank's lawyers did the legal work (*ibid*).

The Bank of Bay Biscayne closed during 1930, and thereafter its powers under the voting trust were exercised by the bank's liquidator. During this period it was necessary to institute a suit to remove certain restrictions imposed on the property in prior deeds. Expenses in connection with that suit, over \$4,000, were borne by Thompson. (Rec. p. 41).

The encumbrances on the property were liquidated in 1933 by payment, made possible by borrowing the funds elsewhere. This loan was secured by a mortgage on part of the property in question. On the payment of these encumbrances in 1933, the control of the petitioner corporation was returned to Thompson. The new debt was repaid in 1936 through the sale of property.

The taxpayer, the petitioner herein, kept no books of account and never had a bank account. It owned no assets other than the real estate in question. It never

transacted any business, except as herein stated, other than the lease in 1934 of part of the real estate for a parking lot, from which \$1,000 was received. The corporation never had any office, place of business or employes. Its sole function was, at the insistence of the bank, to hold title to the four lots. Thompson owned other extensive real property in Miami, title to all of which was in his name, individually.

The property so transferred to the petitioner corporation was sold in three separate parcels in each of the years 1934, 1935 and 1936. The proceeds were received by Thompson and deposited in his bank account. This proceeding involves the sales made in 1935 and 1936. Sales made in 1934 and 1935 were reported by petitioner in a corporation income tax return. Thompson himself, who testified (Rec. p. 45) that he, while a Circuit Judge, was exceedingly busy, never made out an income tax return in his life¹, and knew nothing about the income tax law, employed an auditor to make out his returns. The latter during 1936 learned (Rec. p. 56) of the decision of the Board of Tax Appeals in the *Forshay* case, 20 B.T.A. 537, and suggested to Thompson that Moline Properties, Inc., was also a "dummy" corporation. Acting on his advice, a claim for refund for 1935 was filed by the corporation, and, also on the auditor's advice, the 1936 sales were included by Thompson in his personal return for that year, no return being filed for the corporation. The Commissioner asserted the 1935 deficiency on grounds not here material, and also asserted a deficiency for 1936, plus the statutory penalty for delinquency. Both deficiencies are bottomed on the formal existence of the separate entity.

The foregoing facts are not in dispute, and are set out in the Board's findings (Rec. pp. 17-19). The Board in its opinion recited (Rec. p. 21) that it must be ap-

¹At that time it was supposed that state judges' salaries were exempt from the federal income tax.

parent that the petitioner existed for very limited purposes, the primary one being the protection of creditors. Full beneficial ownership was said by the Board to be in Thompson, who continued to manage and regard the property as his own individually. Citing some of its own earlier decisions, the Board said (Rec. p. 21) that it had frequently held that a corporation which existed merely to facilitate the passage of title to real estate, where the stockholders acted without regard for the corporate entity, was "a mere figmentary agent which should be disregarded in the assessment of taxes." For this reason the Board sustained the petition (Rec. p. 22) and entered a decision of no deficiency or delinquency penalty (*ibid.*).

The Circuit Court of Appeals reversed. The opinion is very brief. The sole ground of the decision is that Thompson "elected to employ a corporation in the handling of certain parcels of his real estate" and that "having chosen the corporate form to conduct these affairs, both Thompson and the corporation must accept the tax disadvantages," and may not "be heard to disavow the corporate existence" to escape corporate taxes. The Court therefore has squarely held that there is an estoppel against a taxpayer's ever invoking the "agency" doctrine, where a corporation is a mere "dummy," or instrumentality or agent of its owners, and that in no conceivable circumstances may the "agency" doctrine ever be applied at a taxpayer's instance. This, it may be suggested, is in harmony with the Commissioner's invariable contention since this Court's decision in *Higgins v. Smith*, 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, and rests on the supposed effect of certain language in that case. Because on this question the authorities are in conflict and the question has never been authoritatively determined by this Court, this petition for review is presented.

JURISDICTION

This being an application for a review of a final judgment of the Circuit Court of Appeals for the Fifth Circuit, the jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended (U. S. Code, Title 28, Section 347), and by Section 1141 of the Internal Revenue Code (U. S. Code, Title 26, Section 1141). The Circuit Court of Appeals had jurisdiction under the second of these sections, namely Section 1141.

The judgment of the Circuit Court of Appeals was entered November 7, 1942 (Rec. p. 93). Timely petition for rehearing was filed which was denied December 11, 1942 (Rec. p. 100).

Cases believed to sustain the jurisdiction are:

Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 49 S.Ct. 499, 73 L.Ed. 918;

Magnum Import Co. v. Coty, 262 U. S. 159, 43 S.Ct. 531, 67 L.Ed. 922;

Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 S.Ct. 594, 37 L.Ed. 445;

Smith v. Wilson, 373 U. S. 388, 47 S.Ct. 385, 71 L.Ed. 699.

QUESTION PRESENTED

The question presented is whether, notwithstanding that facts are found by the Board (now the Tax Court) to warrant disregard of the separate entity of a "dummy" corporation whose sole function is to hold title to real estate, the taxpayer corporation and Uly O. Thompson are estopped, as a matter of law, from asserting disregard of the separate corporate entity, and that the corporation should be treated as a mere agency or instrumentality and ignored for tax purposes.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Brager Building and Land Corporation*, 124 F. (2d) 349, which squarely holds that, notwithstanding certain language in *Higgins v. Smith*, 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, "it is going too far to say that if a taxpayer forms a corporation for his convenience he is thereafter estopped from disclosing the true nature of the arrangement whenever it is of advantage to the government to recognize only the corporate form."

The decision also is in conflict with *North Jersey Title Insurance Co. v. Commissioner*, 84 Fed. (2d) 898 (C.C.A. 3), and with *Inland Development Co. v. Commissioner*, 120 Fed. (2d) 986. There are other cases as well which have permitted a taxpayer to invoke the "agency" doctrine to avoid or reduce taxes.

The above cases cannot be easily reconciled with the decision below. There are slight factual differences, of course; but in these cases the taxpayer in each one was permitted to invoke the doctrine. In the *Brager* case the court squarely held that there was no estoppel against the taxpayer; the Court below in the present case holds the contrary, and does so in the face of the familiar rule making the factual determination of the Board (now the Tax Court) final, and takes the broad position that there is such an estoppel.

2. This case involves an important question of Federal Law which has not been but should be settled by this Court.

This Court in *Higgins v. Smith*, 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, had before it a case in which the government asked for the disregard of the corporate entity. In support of what were the actualities of that

case, this Court did so disregard the corporate entity, saying in that connection that a taxpayer having elected to do business as a corporation must accept the tax disadvantages, and that the government might look at actualities and "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." This doctrine is now being urged everywhere by the Commissioner and is being regarded by some courts as a pronouncement in effect that a taxpayer may never invoke the agency doctrine. The Court below cited in support of the conclusion reached in its brief opinion the decision of this Court in *Higgins v. Smith, infra*, and the Eighth Circuit decision in *Interstate Transit Lines, Inc. v. Commissioner* 130 Fed. (2d) 136, in which according to the Commerce Clearing House 1942 Federal Tax Service (page 9004), a review is now being sought in this Court. Subsequent to its decision in the case just mentioned, the Eighth Circuit Court of Appeals later, in *Palcar Real Estate Co. v. Commissioner*, decided November 3, 1942, not yet reported but available in the Commerce Clearing House 1942 Federal Tax Service, at paragraph 9733, on page 10728, said that as its members read the expressions in *Higgins v. Smith*, it appeared settled that a corporation could not "claim the status of a mere nominalty for income tax purposes, in order to improve the position of its stockholders," and said further that it was immaterial that the corporation might neither have been intended used to secure a tax advantage.

Yet in *United States v. Brager Building and Land Corporation*, 124 Fed. (2d) 349, the Fourth Circuit Court of Appeals, after saying that there was not necessarily an estoppel against the taxpayer "from disclosing the true nature of the arrangement," added that the contrary had been held in many decisions and that its judges "do not understand that this body of the law has for practical purposes ceased to exist." The "body of law" referred to was that based on cases like the following:

Southern Pacific v. Lowe, 247 U. S. 330, 38 S.Ct. 540, 62 L.Ed. 1142;

Gulf Oil Corporation v. Lewellyn, 248 U. S. 71, 39 S.Ct. 35, 63 L.Ed. 133;

Weiss v. Stearn, 265 U. S. 242, 44 S.Ct. 490, 68 L.Ed. 1001;

North Jersey Title Insurance Co. v. Commissioner, 84 Fed. (2d) 898 (C.C.A. 3);

Western Maryland Ry. v. Commissioner, 33 Fed. (2d) 695 (C.C.A. 4);

New York Central R. R. v. Commissioner, 79 Fed. (2d) 247 (C.C.A. 2); Certiorari denied 296 U. S. 653, 56 S.Ct. 370, 80 L.Ed. 465;

Under that "body of law" there was much support for the view that although ordinarily the separate entity must be respected both by the government and the taxpayer, yet in a proper case and on facts evidencing that a corporation is a mere agency or instrumentality, actualities will control. True, it would require a stronger showing when it was the taxpayer who or which seeks to avoid the consequences of the existence of the corporate entity he or it has been responsible for; but under this "body of law" there was no estoppel against the taxpayer if strong enough facts were put forward. The substance, not the form, was allowed to control.

The Board of Tax Appeals has applied the same doctrine in numerous cases, some of which it cited in support of its conclusion in this very case, and are set out in its opinion (Rec. p. 21).

Since the decision in *Higgins v. Smith*, *supra*, the Tenth Circuit Court of Appeals in *Inland Development Co. v. Commissioner*, 120 Fed. (2d) 986, *supra*, making no mention of the dictum relied on by the Commissioner

and the Court below, and stressed by the Eighth Circuit Court of Appeals in the *Palcar Real Estate Co.* case, *supra*, cited *Higgins v. Smith* as an authority favoring the disregard of the corporate entity in a case where it was to the taxpayer's interest to do so. That court also evidently did not think that "this body of the law has now for practical purposes ceased to exist."

The *Brager* and *Inland Development Co.* cases naturally have some minor and unimportant fact differences not in any way going to the fundamental question, which is whether under any circumstances a taxpayer may invoke the "agency" doctrine, or is wholly estopped from doing so by the mere circumstance, without more, that he has brought the entity into its fictional being. Stated differently, does the dictum in *Higgins v. Smith* overrule that "body of law," overrule *Southern Pacific v. Lowe*, *Gulf Oil Corp. v. Lewellyn*, and *Weiss v. Stearn*, and disapprove cases like *North Jersey Title Insurance Co. v. Commissioner*? If so, then the *Brager* and *Inland Development Co.* cases have misread this Court's opinion in *Higgins v. Smith*; but if the dictum was not intended to have the effect, to borrow the language of the *Brager* case, "that this body of the law has now for practical purposes ceased to exist," the Court below erred in reversing the decision of the Board of Tax Appeals.

If there is such an estoppel, the point should be clarified by a decision of this Court. The fact that this important question has never been decided by this Court makes this case an appropriate one for decision by this Court.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this court

for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket as Number 10279, *Commissioner of Internal Revenue v. Moline Properties, Inc.*, and that the decision of the United States Board of Tax Appeals be reinstated and the judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

Dated at Miami, Florida, January 12, 1943.

Respectfully submitted,

Attorneys for Petitioner.

H. H. EYLES

THOS. H. ANDERSON.

BART A. RILEY

Attorneys for Petitioner.

(NOTE: Since the legal propositions upon which petitioner relies have been discussed sufficiently in the foregoing petition, petitioner refrains, in the interest of brevity from appending a brief).

APPENDIX

Revenue Act of 1934, ch. 277, 48 Stat. 680:

SEC. 13. TAX ON CORPORATIONS.

(a) *Rate of Tax.* There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, ***

SEC. 22. GROSS INCOME.

(a) *General Definition.* "Gross income" includes gains, profits and income derived from ***sales, ***

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, ***

Revenue Act of 1936, ch. 690, 49 Stat. 1648:

SEC. 13. NORMAL TAX ON CORPORATIONS.

* * *

(b) *Imposition of Tax.* There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation, a normal tax as follows:

* * *

The provisions of Sections 22(a) and 52 of the Revenue Act of 1936, *supra*, are identical with those set forth above.